

Before the
Federal Communications Commission
Washington, DC 20554

ORIGINAL

In re Applications of)	MM Docket No. 92-70
SABLE COMMUNITY BROADCASTING)	File No. BPED-851003MB
CORPORATION)	
Channel 217A)	
Hobson City, Alabama)	
BOARD OF TRUSTEES SHORTER COLLEGE)	File No. BPED-860205MD
Channel 217A)	
Rome, Georgia)	
GADSDEN STATE COMMUNITY COLLEGE)	File No. BPED-860307MK
Radio Station WSGN(FM))	
Channel 217A)	
Oxford, Alabama)	
TRINITY CHRISTIAN ACADEMY)	File No. BPED-860512MB
Channel 217A)	
Oxford, Alabama)	
For Construction Permit for)	
New and Modified Noncommercial)	
FM Facilities on Channel 217)	

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Honorable Arthur I. Steinberg
Administrative Law Judge

MOTION FOR ACCEPTANCE NUNC PRO TUNC OF
LATE-FILED NOTICE OF APPEARANCE

Sable Community Broadcasting Corporation ("Sable"), by its attorneys, pursuant to Section 1.221(c) of the Commission's rules, hereby submits this Motion to have its late-filed Notice of Appearance, which it filed on May 19, 1992, accepted on a nunc pro tunc basis as if it was filed by the due date for Notices of Appearance in this proceeding, May 6, 1992.

By Order, FCC 92M-614, released May 28, 1992, the Presiding Judge dismissed Sable's Notice of Appearance because it was late-filed pursuant to Section 1.221(c) of the Commission's rules, and because it was not served on the other parties to this proceeding, pursuant to Section 1.211 of the Commission's

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Up until a few days ago, when undersigned counsel was retained by Sable, Sable was effectively acting in a pro se capacity. Although Sable's Notice of Appearance was filed with the name and address of the law firm of Reid & Thomas appearing in the salutation, the document was actually prepared by Maudine J. Holloway, a lay person and the President of Sable, for the signature, along with Ms. Holloway's, of Marcus Reid. Furthermore, Marcus Reid became involved in the Notice of Appearance process primarily because he is a member of the Board of Directors of Sable, not because he is an attorney. Finally, Marcus Reid does not practice in the area of communications.

Thus, Sable was effectively without counsel, and certainly without counsel versed in the minutiae of communications law, at the time the Notice of Appearance was due. They have now retained the undersigned, and it is certainly not anticipated that any further deadlines will be missed in the future.¹

That Sable may have been slow in reacting to the Hearing Designation Order is particularly understandable in light of the fact that Sable's application has been pending since 1985! Although not meant as a criticism of the FCC's FM Branch, the irony and the harshness of dismissing this applicant after seven years of inaction on the FCC's part because its Notice of Appearance was thirteen days late is inescapable.

Most importantly, at this early stage of the proceeding, there can be no fair and legitimate claim that accepting Sable's late-filed NOA on a nunc pro tunc basis will prejudice the parties or

¹ Simultaneously herewith, undersigned counsel is entering a Notice of Appearance on behalf of Sable.

this proceeding. As of the other parties' receipt of the Order, they were placed on notice that Sable intended to participate in the proceeding. The first procedural deadline established by the Presiding Judge's Order Prior to Prehearing Conference, FCC 92M-493, released April 24, 1992, is tomorrow, June 5, 1992, by which the parties were to have conferred for the purpose of exploring settlement, the possibility of a share-time arrangement, the scope of the issues to be tried in the case, and discovery. Today, June 4, 1992, undersigned counsel called counsel for Gadsden State Community College ("Gadsden") and learned that a conference had been held earlier today.

Since Sable's application remains pending as of today, June 4, 1992, it has a right to participate in a discussion concerning the subjects designated by the Order Prior to Prehearing Conference by the close of business on June 5, 1992. Counsel for Gadsden informed counsel for Sable that Gadsden has pending a petition for leave to amend and amendment which would resolve the mutual exclusivity of its application as it relates to Sable's and the application of Trinity Christian Academy ("Trinity"). Sable also understands that the Board of Trustees, Shorter College has voluntarily requested the dismissal of its application, leaving only Sable and Trinity as mutually exclusive applicants. The undersigned intends to pursue a communication with counsel for Trinity regarding the matters designated to be discussed by the Order Prior to Prehearing Conference.²

² Early in the day, counsel for Sable placed a call to counsel for Trinity today, but Trinity's counsel was unavailable. Counsel for Trinity returned undersigned counsel's call at 4:55 p.m. today,
(continued...)

Sable and Sable's counsel also learned today that a motion to dismiss Sable's application was filed by Trinity on May 29, 1992. The due date for Sable's response is June 9, 1992, and Sable intends to respond to the motion to dismiss.

The HDO also directed Sable to file an environmental assessment and evidence that it published local notice of the filing of its application within thirty days of the release of the HDO, or by May 15, 1992. Sable intends to amend its application to supply the requested information, with an accompanying motion containing a good cause showing for late acceptance of the amendments. Sable will show that it did publish local notice of the filing of its application, and that its proposal will not have a significant adverse impact on the environment. Since the amendment will still be filed in the very early stages of the proceeding, Sable will be able to show that, notwithstanding its lateness, the amendment meets the good cause test of Erwin O'Conner Broadcasting, Co.

In considering late-filed notices of appearance, the Commission takes into account equitable considerations, such as the sincerity of the excuse, the relative level of sophistication of the applicant, and whether the applicant had engaged in gamesmanship in order to gain an unfair advantage over its competitors. See John Spencer Robinson, 68 RR2d 397 (Rev. Bd. 1990). Here, there was obviously no attempt by Sable to gain an

²(...continued)
June 4, 1992.

upper hand over its competitors. Furthermore, this was a relatively unsophisticated applicant.

It merits emphasis that this is a noncommercial applicant and a noncommercial proceeding. The applicant has shown a proclivity to be more lenient and flexible with noncommercial applicants than it is with commercial applicants. The Commission does not require fees from noncommercial applicants. The Commission does not apply the "hard look" processing standards to noncommercial FM applicants.³ The noncommercial applicant has a more lenient financial qualifications standard to meet than does the commercial applicant. See NTA Broadcasting Corp., 22 RR 273, 291, 293 (1961); Alabama Citizens for Responsive Public Television, Inc., 43 RR2d 999, 1011 (1978); KOED, Inc., 5 FCC Rcd 1784, 1785 (1990). In the same vein, the standard by which a late-filed Notice of Appearance by a noncommercial educational applicant, particularly one who was effectively without counsel at the time, should be judged by a flexible, understanding and lenient standard.

³ Whereas the commercial FM applicant must meet a letter-perfect standard in submitting an application, a noncommercial applicant which submits a defective application is allowed one opportunity to amend its application to correct the defect, in which case the application will be reinstated nunc pro tunc. Compare Report and Order in MM Docket No. 84-750, 58 RR2d 776 (1985) ("hard look" processing standards adopted) with the August 2, 1984 Public Notice entitled "Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications," 56 RR2d 776 (1984). In a Public Notice entitled "Statement of New Policy Regarding Commercial FM Applications that Are Not Substantially Complete or Are Otherwise Defective," Mimeo 4580, released May 16, 1985, at n.1, the Commission stated that the "hard look" policy would apply only to defective commercial FM applications.

WHEREFORE, for the foregoing reasons, Sable's late-filed Notice of Appearance should be accepted nunc pro tunc, as if filed on May 6, 1992, and Sable should be permitted to proceed to prosecute its application accordingly.'

Respectfully submitted,

SABLE COMMUNITY BROADCASTING
CORPORATION

By: 
Gerald Stevens-Kittner

ARTER & HADDEN
1801 K Street, NW, Suite 400
Washington, DC 20006
(202) 775-7138

June 4, 1992

Its Attorneys

' A copy of this Motion and the accompanying Notice of Appearance are being hand served on all parties concerned.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

In re-Applications of)	MM Docket No. 92-70
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BOARD OF TRUSTEES)	File No. BPED-860205MD
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GADSDEN STATE)	File No. BPED-860307MK
COMMUNITY COLLEGE)	
)	
TRINITY CHRISTIAN)	File No. BPED-860512MB
ACADEMY)	
)	
For Construction Permits)	
for New and Modified)	
Noncommercial FM Facilities)	
on Channel 217)	

TO: Secretary, Federal Communications Commission

NOTICE OF APPEARANCE

Sable Community Broadcasting Corporation, by its counsel and pursuant to Section 1.221 (c) of the Commission's rules, hereby gives notice that it will appear on the scheduled hearing date and present evidence in accordance with the **Hearing Designation Order**, DA 92-412, released April 15, 1992.

Respectfully submitted,

THE SABLE COMMUNITY BROADCASTING CORPORATION

By Maudine J. Holloway
Maudine J. Holloway

By Marcus W. Reid
Marcus Reid

Its Counsel

Reid & Thomas
501 Southtrust Bank Building
1000 Quintard Avenue
Anniston, AL 36201

Dated: May 15, 1992

CERTIFICATE OF SERVICE

I, Michelle Jarrett, a secretary in the law firm of Arter & Hadden, hereby certify that on this 4th day of June, 1992, a copy of the foregoing MOTION FOR ACCEPTANCE NUNC PRO TUNC OF LATE-FILED NOTICE OF APPEARANCE was served by hand-delivery, unless otherwise indicated, to each of the following persons:

Honorable Arthur I. Steinberg
Administrative Law Judge
Federal Communications Commission
2000 L Street, N.W., Room 228
Washington, D.C. 20554

Paulette Laden, Esquire
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Michelle Jarrett

* via Federal Express